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No. 81-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID R. HARRIS, Superintendent, Green Haven Correctional Facility,

Petitioner,

—*v.*—

JOSE RIVERA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR JOSE RIVERA IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A)[1] is not reported. The opinion of the court of appeals (Pet. App. B) is reported at 643 F.2d 86.

[1] "Pet. App." refers to the appendix to the petition.

JURISDICTION

The opinion of the court of appeals was dated February 18, 1981. A timely petition for rehearing with suggestion for a rehearing en banc was denied on April 21, 1981. Petitioner's motion to stay the mandate pending determination of the petition for a writ of certiorari was denied on May 12, 1981, effective May 25, 1981. The petition was filed on July 6, 1981. Petitioner's application for a stay was granted by this Court on July 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Respondent's conviction lacks a rational basis.

2. Whether Federal habeas corpus jurisdiction authorizes a Federal court to direct a state court judge to explain irrational and logically irreconcilable verdicts.

STATEMENT

Respondent Jose Rivera, his wife Cynthia Humdy, and a friend Earl Robinson were indicted in 1973 for the crimes of robbery in the first degree, robbery in the second degree, burglary in the second degree, grand larceny in the third degree and criminal possession of a weapon, all in violation of New York Penal Law Sections 160.15, 160.10, 140.25, 155.30, and 265 et seq. The charges stemmed from an incident that took place on the morning of March 26, 1973, at the apartment of Milagros Torres, the victim of the alleged robbery. All three defendants waived their right to a jury, and proceeded to trial before a justice of the New York State Supreme Court.

Ms. Torres testified that she was the victim of an armed robbery perpetrated by the three defendants acting in concert. She stated that on the morning in question, she responded to a knock on her door and observed through the peephole a woman

dressed like a nurse, who held up a slip of paper and claimed to be investigating something concerning vaccination. Torres opened the door a few inches, leaving the chain lock attached, whereupon Rivera stepped up to the opening of the door, brandished a handgun, and ordered her to open the door. Torres screamed, and tried to close the door, but Robinson forced the door from the outside, breaking the chain lock. Rivera and Robinson dragged Torres to the bedroom. Robinson placed handcuffs on her, then taped her mouth and eyes. A short time later, she heard a commotion in the apartment. Rivera returned to her in the bedroom, removed the tape and handcuffs, and told her not to accuse them when the police arrived. Almost immediately thereafter, the police entered the apartment; Torres ignored Rivera's warning and told them what had just happened.

Torres' neighbor Robert Parilla testified that on that morning he heard a woman scream, and a man threaten to kill someone*. He attempted to look out into the hallway through the peephole of his door, but his vision was obstructed by something placed over the opening. He then looked under his door, observing two pairs of men's shoes. He placed a call to the police, and upon their arrival informed them of what he had seen and heard. The officers knocked on Torres' door, identified themselves, and asked whether everything was alright. A woman responded that she was taking a shower. While standing around in the hallway, Torres' friend Erminda Gonzalez arrived. In her presence, the officers knocked again, asking that the door be opened so that he could verify that everything was indeed all right. A woman replied from within that she could not open the door because she was undressed. Gonzalez told the police that that voice was not Torres'. They renewed their order that the door be opened. Sometime during all of this, Parilla returned to his apartment, seeing on the fire escape a woman wearing a nurse's uniform. He informed the police, and the woman (Humdy) was arrested and brought to the hallway. The door to Torres' apartment was finally opened from within, and Rivera and Robinson emerged.

Gonzalez and the arresting officers also testified, providing additional detail and circumstantial corroboration. Each testified

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* Torres remembered no such threat.

to the disarray of the apartment upon their entrance, with furniture overturned and clothing strewn about. Torres appeared frightened, was crying, and bore a red mark upon one cheek. The bathtub of the apartment contained a large amount of cash and several pieces of expensive jewelry*. A loaded and operable pistol was found on the living room floor. Two pairs of handcuffs and a key were found in the bedroom. Humdy possessed a roll of currency in her pocket totaling $540, subsequently identified by Torres as cash belonging to her daughter. The door to Torres' wall safe was ajar, and the safe empty. No tape was found in the apartment. The chain lock allegedly broken was neither noticed by the arresting officers, nor introduced into evidence at trial.

Earl Robinson, the only defense witness, testified that on the morning in question he asked Rivera to give him a ride to work. Rivera, who was taking Humdy to the beautician school where she was a student, agreed, but said that he first had to stop to collect his winnings on a number he had hit the previous weekend. The three went to Torres' apartment, where they were ushered in and asked to wait while she "checked the work." Robinson and Humdy waited in the living room, while Rivera accompanied Torres to the kitchen. Robinson stated that a loud argument ensued between Rivera and Torres. During this argument, there was a knock at the door. Torres emerged from the kitchen to ask who it was; a voice answered "Police" and asked what was going on. Torres replied, "Nothing," hurriedly gathered cash and policy slips and ran to the bathroom. Robinson recalled that he heard the toilet flushing as the police knocked once more on the door, Torres stated that she would open up as soon as she got dressed, then made another trip from the kitchen to the bathroom with money and numbers slips. Hiding her calculator under the bed, she instructed the three defendants to climb out onto the fire escape. Only Humdy complied; shortly thereafter Robinson announced that he was going to open the door, and did so. Rivera and Robinson walked into the hallway outside the front door, joining Humdy who, already under

* The officers testified that they took this property to the stationhouse, returning it to Torres several days later. The only property they vouchered was the $540 seized from Humdy.

arrest, had preceded them. Torres told the officers that there had simply been an argument among friends, and the three were told by the police to leave. Gonzalez spoke briefly to Torres in Spanish, then both were accompanied by the officers into Torres' apartment, from which the four emerged moments later. The three defendants, not having yet left, were immediately placed under arrest. Rivera beseeched Torres to "tell them the truth," but she said nothing. Once outside, Rivera told the officers that Torres was in the numbers business and that he had been at the apartment to collect on a hit.

In their summations, the trial counsel for both sides agreed on only one thing: that the verdicts hinged upon which of the witnesses were telling the truth. The Assistant District Attorney, citing the disarray of the apartment, the handcuffs in the bedroom, the handgun on the living room floor,the red marks on the victim's face, urged that the defendant's guilt was amply established. Defense counsel argued that their version of events was corroborated in several respects, and that of the People weakened by several evidentiary discrepancies. They argued that Torres' original complaint alleged only Menacing, a misdemeanor under New York law, while the indictment charged felonies. They pointed out that Torres told the Grand Jury that she saw Rivera hide his handgun in the living room chair, yet it was discovered in plain view on the living room floor. The broken chain lock was not produced. No tape was found in or around the apartment. Torres, a supervisor in a night laundry earning between $75 and $95 per week, took yearly vacations to South America and Europe, owned a new car, and had a wall safe installed in her apartment. The valuable contents of the bathtub, held by the police for several days, were neither counted nor vouchered. Finally, the trial court took judicial notice of the fact that $540, the amount found in Humdy's pocket, was the precise payoff on a $1 policy bet.

The trial judge entered general findings on each of the charges. Stating that he harbored reasonable doubt as to Robinson's guilt, he acquitted him on each count of the indictment. The judge found Rivera and Humdy not guilty of first degree robbery, second degree burglary and weapons possession. He

found them guilty of second degree robbery, third degree burglary and third degree grand larceny. Rivera was subsequently sentenced to concurrent terms of zero to seven years on the burglary count and five to fifteen years on the robbery count, both to be served consecutively to a prior unrelated federal term. The grand larceny count was dismissed at sentencing as necessarily included within the robbery count. The Appellate Division affirmed the conviction without opinion. The Court of Appeals denied leave to appeal. The United States District Court for the Southern District of New York denied Respondent's petition for a writ of habeas corpus. The United States Court of Appeals for the Second Circuit reversed the denial and "remanded" to the state court with instructions (Pet.App. B26). Rivera has been incarcerated in a state penal institution pursuant to these judgments since June 1, 1977.

ARGUMENT

1. Respondent's conviction lacks a rational basis because implicit in the trial judge's acquittal of Robinson and his findings with respect to the charges against Rivera and Humdy is his rejection of the very evidence necessary to sustain Rivera's conviction on the three counts he eventually was found guilty of. Under the applicable sections of New York penal statutes as applied to the facts of this case, the verdicts are a logical impossibility.

Respondent was acquitted of burglary in the second degree, but convicted of burglary in the third degree. Under N.Y. Penal Law §140.20, a person is guilty of burglary in the third degree when he "knowingly enters or remains unlawfully in a building with intent to commit a crime therein." Burglary in the second degree is simply burglary in the third degree with the presence of at least one of four aggravating elements listed in N.Y. Penal L. §140.25. Conviction of burglary in the second degree requires proof of burglary in the third degree, and proof that the defendant or another participant in the crime is armed with explosives or a deadly weapon, causes physical injury to a non-

participant in the crime, uses or threatens the immediate use of a dangerous instrument, or displays what appears to be a firearm. In acquitting respondent of burglary in the second degree, the trial judge necessarily rejected Torres' testimony concerning her physical injuries as well as her testimony that Respondent was armed.

With reference to the requirement of §140.20 that the entry be unlawful, the People were required to show that it was effectuated without license or privilege. *People v. Ennis*, 37 A.D.2d 573, 322 N.Y.S.2d 341, *affirmed*, 30 N.Y.2d 535, 330 N.Y.S.2d 384 (1971). However, the trial judge rejected the allegation that Respondent carried a gun; and by virtue of his acquittal of Robinson, also necessarily found that Robinson did not break open the door.

Robbery in the second degree requires, as a predicate, "forcible stealing." Forcible stealing is defined in N.Y. Penal Law §160.00 as the commission of a larceny involving the use or threatened use of physical force. The trial judge rejected the testimony that force was used or threatened—at least as to Robinson. Despite Torres' testimony that Rivera threatened her with a gun, all three defendants were acquitted of possession of a dangerous weapon. As for the alleged handcuffing and taping of the victim Torres, this was, according to her own testimony, committed by Robinson, who was acquitted on all charges.

The crucial issue at the trial was whether the $540 found in Humdy's pocket was taken from Torres by force or threat, or whether it was transferred through some other, non-criminal form of persuasion. The evidence supporting the allegation of a forcible taking was obviously sufficient. However the actual disposition of the various charges made by the trial judge was unfathomable. He rejected Torres' allegations that Rivera had a gun, that he threatened her, that Robinson broke down the door to get into the apartment, that she was handcuffed and taped—at least as to Robinson. As to Respondent, the judge had to credit at least some of the evidence he had just finished rejecting, for without evidence of force, a verdict of guilty of second degree robbery could not logically have been rendered.

As the Second Circuit correctly observed, the record discloses no basis upon which the trial court, if not convinced beyond a reasonable doubt as to the guilt of Robinson, could have been convinced that Rivera was guilty. The trial judge's simultaneous belief of Torres' testimony as to Respondent and rejection of that testimony as to his codefendant plainly denote the absence of a rational basis underlying the conviction.*

2. Petitioner erroneously contends that the court below gave constitutional dimension to consistency in non-jury verdicts as between codefendants (Pet. 7-9). In fact, the court expressly refrained from deciding whether the Constitution requires such consistency (Pet.App. B2). Rather, the court held that Respondent's conviction appeared to violate due process inasmuch as it appeared to lack a rational basis, and remanded to the state court for proceedings to determine whether in fact this was so. As the court correctly noted (Pet.App. B), a state criminal conviction which to the federal court appears to lack a rational basis has long been a ground for habeas corpus relief. 28 U.S.C. §2254(d)(7). The novelty of the decision lies solely within the fact that never before have logically irreconcilable bench-trial verdicts been claimed to warrant relief under the "due process" provision in 28 U.S.C. 2254. Perhaps this is so because never before have such incomprehensible verdicts been rendered in a state criminal conviction.

We do not question the propriety of the general rule that inconsistencies in a verdict do not affect the validity of a criminal conviction. *Hamling* v. *United States*, 418 U.S. 87, 100-01 (1974); *Dunn* v. *United States*, 284 U.S. 390 (1932). Yet even as to that rule exceptions exist, most notably 1) the inconsistent conviction of a conspirator whose alleged co-conspirators have been acquitted, *see Hartzel* v. *United States*, 322 U.S. 680, 682 n.3, (1944); but cf. *Standefer* v. *U.S.*,447 U.S. 10, 20 (1980) (aider and abettor may be convicted despite acquittal of princi-

* Not absolutely certain that this happened, the Second Circuit granted the writ conditionally, giving the state court 90 days to demonstrate by appropriate findings that the simultaneous acquittal and conviction was in fact based upon rational conclusions not apparent from the bare record of the trial. (Pet.App. B26.)

pal) (dictum); and 2) inconsistent multiple convictions, where the defendant could be guilty of either, but not both, charged offenses. See, *Villarreal Corro v. U.S.*, 516 F.2d 137, 141 (1st Cir. 1975); *United States v. Bethea*, 483 F.2d 1024, 1029-31 (4th Cir. 1973).

As the Second Circuit correctly concluded, the reasons for ascribing sanctity to a jury verdict have no application to a verdict rendered by a judge sitting as trier of fact. First, the judge's decision involves no element of collective deliberation and thus no element of compromise in his assessment of the evidence. Second, there is no need to defer to the privacy of the deliberative process or to the possibility that the jury is merely exercising its power to decide a case "in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

There is thus no logical reason or necessity to allow a judge to reject certain evidence in acquitting one defendant, but then credit that same evidence in convicting another. As shown above, that is precisely what the judge in this case did. The Second Circuit's remand to the state court for an explanation of this apparent irrationality was eminently proper.

Petitioner incorrectly claims that two other circuits have ruled that consistent bench trial verdicts are not constitutionally required, citing *U.S. v. West*, 549 F.2d 454 (8th Cir.), cert. denied, 430 U.S. 956 (1977); *McElheny v. U.S.*, 146 F.2d 932 (9th Cir. 1944). In fact the Second Circuit's ruling in this case has now been expressly adopted by the Ninth Circuit, distinguishing *McElheny* on the ground, *inter alia*, that that decision failed to consider all the relevant factors. *US v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 n. 2 (9th Cir. 1981). The Eighth Circuit's apparent disagreement is dictum, since the court there ruled that the verdicts before it were in fact consistent.

Contrary to Petitioner's assertion (Pet. p. 9), this Court's decision in *Jackson* v. *Virginia*, 443 U.S. 307 (1979) does not foreclose the factual inquiry and analysis engaged in by the lower court. In *Jackson*, this Court held that where the issue is

the *sufficiency* of the evidence underlying a criminal conviction, the reasoning process actually used by the trier of fact to reach the verdict is irrelevant to the habeas corpus court's inquiry, so long as there exists evidence which would permit a trier of fact to find guilt beyond a reasonable doubt. Inconsistency, however, is a different story. Where the verdicts as to co-defendants appear to be logically impossible, the fact that sufficient evidence is available fails to remove the due process violation inherent in the irrational conviction of one of them. In any event, the analysis conducted by the Second Circuit is frequently conducted by appellate courts in ruling upon similar claims. See, e.g., *Ashe v. Swenson*, 397 U.S. 436 (1970).

The Second Circuit thus correctly held that its habeas corpus jurisdiction authorized it to remand the case to the state court for explanation of the apparent irrationality underlying Respondent's conviction. *See*, e.g., *Sigler v. Parker*, 396 U.S. 482 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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